The Creation of Legal Dependency: Law School in a Nutshell

by Michael Lowy and Craig Haney

We have taken a look at our own legal roots as well as the legal traditions of other cultures. With this historical/comparative perspective we can gain a clearer, more objective picture of the American Legal System as it exists today. But what about the individuals who make up this system? Who is your common garden-variety lawyer? To fully understand the species we must first scrutinize the ritual metamorphosis that each prospective candidate must undergo. Law school is the process whereby citizens from every race, creed, color, gender, size, and background are turned into lawyers. It is awesome what transitions are accomplished in these three short years.

> . . . They come into these sacred halls of which you have become the yearling priests. They stink of laity. They must be cleansed, they must be quickly cleansed, or all of us will be profaned. Gird up your loins, then, my beloved, and descend into the pools; in each left hand a pot of legal germicidal soap, each right fist brandishing a foot-long brush of dialectic. Seize these new woolly lambs and scrub them for the law . . .
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> — *Karl Llewellyn*
> The Bramblebush (*1930*)

We may be among the few people who went to law school hoping not to get "hooked" on law. We do not know if we succeeded. If we did it is only because we came to law school with a partial immunity to the condition. Graduate education (in anthropology and psychology) and several years studying the legal system critically, as scholars, gave us an alternative perspective with which we could understand and analyze what was happening to us and our classmates. Indeed, we attended law school in part to *understand* the cultural and psychological assumptions embedded in the process of legal education.

As social scientists we were struck by the extent to which law and law school was consciously, explicitly, and vehemently anti-social science. To create legal dependency among its acolytes, legal education weans them away from all competing sources of understanding. Many law professors savagely attack and purge alternative explanations of human behavior. Control over students, many of whom were social science majors in college, is established quickly. This control is accomplished by depriving students of their familiar models of social problems and hence their familiar solutions. This deprivation is not based on an adequate critique of these models or on a demonstration that the solutions they imply are unworkable. They are dismissed with what soon becomes the most damning indictment of all — they are simply "non-legal".

The results of this process are tragic and profound. Legal "junkies" are set loose upon society looking for a fix. Their influence is pervasive, extending far beyond the courts, into business and government. Dependency upon the legal model in this society is so pronounced that many promising social change programs or efforts are either crushed or co-opted by law and legalism. We believe that a careful examination of legal education and the legalistic frame of mind it creates will lead analysts to an abiding pessimism about the use of law as an instrument of progressive social change. We think so, not — as some of our colleagues believe — because law is primarily "derivative" and therefore impotent; rather because so many of those who operate and staff our legal system have been made intellectually dependent upon a view of truth, justice, and human behavior that serves to maintain the status quo. Our purpose in writing this essay is to describe the basis of this legal dependency. We hope that from this description prospective law students as well as other non-lawyers will gain some insight into the conceptual world inhabited by most lawyers.

Thinking Like A Lawyer: The Road to Salvation

Legal education begins with a well-orchestrated campaign to destabilize, disorient, and intimidate its 36|37 recruit. The process begins immediately. Students are assigned cases to read with little or no guidance as to what they are to focus on. Even though some of these initial cases are quite brief, students invariably spend hours trying to make sense out of what is essentially a foreign language (legalese). Initial comprehension is virtually impossible.

The resulting confusion and disorientation is particularly traumatic to a group of typical law students whose verbal prowess has been previously unquestioned. The reaction of the professors to student distress is a key to understanding the creation of legal dependency. Rather than explaining or empathizing with the difficulty of the task and the inexperience of the beginners, the professors demand competence and many humiliate those students who do not quickly appear to master the new language. As one of our professors succinctly put it: "In order to be a lawyer, you have to sound like you know what you're talking about." For those who adopted this point of view, stopped trying to make sense out of what they were reading in terms of their previous models of reality, and began aping their teachers, control was quickly established.

Students are humbled by this abrupt and painful transition. They are made to feel inadequate in their encounters with the seemingly vast, even mysterious, complexities of the law. It is important to recognize that the complexity resides as much in the way law is taught and presented, as it does in the material itself. Textbooks are no more than collections of cases in which no basic principles are summarized or underscored. The cases are presented in no discernable order — an 1840 Massachusetts case follows one 1957 in California and an 1803 English case. (Imagine what this does to the development of an historical or sociopolitical analysis of law.) The opinions are not written to be understood, least of all by students. Some of them have been selected precisely because they are such bad examples of logic and reasoning. And these are not clearly distinguished from the good ones. The opinions continuously introduce terms and concepts that are nowhere defined.

To anyone who looks closely at the process of legal education, it is hard to avoid the conclusion that the resulting confusion is intentionally created. It is also hard to avoid the conclusion that if law were taught the way many other academic subjects are — with pedagogical concern for clarity and organization — law school would take no more than one year. (Bar review courses, in which most of the three-year curriculum is taught, adopt precisely these strategies and take only six weeks.)

Confronted with this maze of confusing and poorly presented information coupled with the intimidating and competitive atmosphere of law school, many students lose their confidence, and with it their willingness and ability to challenge. Vision and perspective are too often sacrificed as well. Since they cannot really fathom the depths of the law, or perceive its boundaries, their gaze can hardly transcend it. Many give up any hope of changing or improving law and instead seek only to understand or master it. By the time they are comfortable enough with the intellectual content of the law school curriculum, it is too late. They have taken its categories as their own. The initial confusion of law school leads to helplessness, helplessness to vulnerability. From this purgatory of confusion, intimidation, and self-doubt, "thinking like a lawyer" is offered as the only salvation.

Legal Librarianship

For some who remain obdurate, their introduction to the law library becomes a turning point in their struggle to remain independent. In many ways, the law library is a remarkable and efficient information 37|38 storage and retrieval system. It is also intimidating and frightening. The first assignments, again largely in the absence of adequate preparation or instruction, set students to work on finding a case about a particular and very specific kind of human problem. The exercise is remarkable in several respects. Again, a simple task such as looking up information in a library becomes, for those used to accomplishing such tasks in minutes, a labor of many hours.

Secondly, but more profound for the issue of legal dependency, the student is led into the seemingly endless world of appellate case law. After marvelling at the range of this monument to the common law, students are left with the impression that the decided cases contain within them the answers to every conceivable human problem. Not only does each issue appear to have been carefully and exactly defined, but a range of alternative, seemingly exhaustive answers have been given by courts from different centuries and different jurisdictions. The social science and humanistic approaches to problem-solving are nowhere to be found here and soon begin to pale in comparison to the accumulated wisdom of many centuries of the "English-speaking people".

Moreover, what the courts have said about these problems is *all* that comes to matter. Here the students are introduced to and immersed in the historically conservative and fundamentally authoritarian nature of legal argument and decision. Current problems are solved on the basis of decisions made by past courts who are "higher" authorities in our hierarchically arranged system of law. *Who* has solved these problems is what matters: the quality and cogency of their logic, the range and validity of the factual record on which their opinion was based, the bias and prejudice that may have informed their decision, the historical and even geographical idiosyncrasies that may render their opinion obsolete, irrelevant, unjust are largely ignored. These cases come to define the range and domain of legal reasoning. They set the limits of legal problem-solving, indeed, of legal thought itself. But who are these judges? From what narrow socioeconomic and intellectual backgrounds do they come? How have these remarkably similar backgrounds influenced their decisions? What do they *really* know about the people and situations affected by their decisions? These questions go unasked and unanswered.

Because of the students' initial helplessness in the face of foreign and confusing legal reasoning, these opinions appear to contain not only wisdom but a mysterious, awesome logic capable of being fathomed by only the greatest of minds (an image fostered by the tone and symbolism of law school classrooms and decor). By the time students have achieved enough familiarity with the foreign language of law (again, offered without benefit of glossary or dictionary), that mysterious logic has become their own — not to be objectively examined or critiqued, but rather to be skillfully and adeptly employed in legal discourse and debate with one's fellow, fledgling lawyers. A virtual stranglehold on the legal imagination is thus insured after only a few short months in law school.

Hard Cases, Bad Law, and Law School

Those who relish the movies of Italian film director Federico Fellini would love the typical law school classroom. The collection of human oddities and tragedies typically presented in case material is wondrous to behold. This technique — using "hard cases," those that are at the fringes of (or beyond) our capacity to understand or interpret logically — diverts student attention away from the reality of the everyday. No matter that most criminal cases involve poor young people who are accused of robbery or burglary — the criminal law class focuses on ax-murdering somnambulists. Forget that industrial pollution and occupational health hazards are everyday phenomena, the law school class focuses on exploding bottles and bizarre coincidences.

In a seemingly unending parade of statistically insignificant occurrences, the student's theories for explaining and understanding human behavior are severely tested. The belief that life is infinitely complex and that one can know the perversity that lurks within the hearts of man is engendered. The perfect compatibility of these legal beliefs with the laissez-faire world view that eschews social planning and government regulation in favor of the "invisible hand," of course, is nowhere noted or discussed.

For the remaining recalcitrant few, it is often the "hard case" that converts them to the legal model. For example, consider the case of *Riss v. City of New York*, 22 NY 2nd 579 (1968), and the way it was presented in class. The facts, although unusual, are straightforward. Ms. Riss sought police protec- 38|39 tion from her former suitor when he threatened to harm her after she had rejected him. The police declined to provide her protection, claiming that they had inadequate resources to protect every citizen who had been threatened. The jilted suitor carried out his threats by hiring a third person to throw lye in Ms. Riss's face, causing permanent damage to her vision.

The injured party's lawsuit against the police was dismissed, the court stating that it lacked the power to allocate police resources (which it decided was a legislative or executive function). Class discussion of this case focused upon the alleged policy reasons behind the decisions and a general theme of minimal

court involvement developed. However, not once were students encouraged to examine the myriad of empirical questions on which any real policy analysis must rest: Just how many threats were there in this city? What do we know about the likelihood of such threats being carried out? What else were the police doing? Who was getting protection? How have other jurisdictions handled the situation? Without answers to these questions, and thus with no general factual context for the case, no real policy analysis could proceed. Nonetheless, the incomplete and idiosyncratic facts of this case were used as a basis for developing a general attitude of judicial restraint — the idea that judges should refrain from deciding certain kinds of issues that other branches of government could control.

Then a quite unusual situation developed. Ordinarily, law professors never talk about the consequences or aftermath of policies and rules that are decided in the cases. The implementation or impact of appellate case law is apparently beyond their control or interest. However, the torts professor did comment on the consequences of the Riss case, a few days after its initial class discussion. After serving many years in prison, the jilted suitor, Mr. Pugash, was released and *married* Ms. Riss. Incredible!! The class was upset by this outcome. We were confused. Clearly, if this outcome was possible, who could really say what was right or better or proper for other human beings? The lesson was dramatic — who really knows? Who can predict human behavior? As a lawyer, all you are required to do is provide a mechanism — the legal process — for understanding human behavior.

Why was this the only case in which we learned the outcome for the participants? Why not the outcome or consequences in the hundreds of thousands of typical cases in which the results are far more predictable? This focus on the unusual or exceptional event undermines any sweeping critique of what exists in favor of the more "pragmatic" concession to the status quo. To accommodate the most improbable, we ignore the normative and important. A rejection of social science data and methods is essential to this process.

The Strawman Has Tremendous Clout

On occasion, law professors lead their students down the "ugly path" of social-science reasoning. Their distortions, otherwise known as strawmen, turn out to have tremendous vitality and power. Consider the following discussion from a criminal law class, on the necessity of dealing with one case at a time, and not allowing the defenses of "poverty", "situation", or "culture". The question at issue was why social-science data is generally not admitted in defense of alleged criminals. The professor used the following argument. Since much statistical evidence is available to support the fact that more than half of all felony arrests in the U.S. are made on minority males between the ages of 17 and 35, the data could be used to "solve" the crime problem — by incarcerating all minority males between those ages! Using this strawman argument, the professor went on to explain that for this reason, we need the criminal law with all its built-in safeguards, to focus only on the individual, and to protect the constitutional rights of the individual. Notwithstanding the fact that few people have *ever* proposed misusing such statistics in this fashion, we were invited to believe that the individuation of the crime problem was what kept hordes of ill-intentioned social scientists from depriving us all of our constitutional rights to be treated as unique human beings.

It is important to realize how skillfully the professor had set up the strawman. First of all, he entirely skirted the issue of a differential arrest rate for minority males in this country. The first question a criminal law school class might want to examine is why only certain people get arrested for certain crimes? Instead the entire class focused on "crime in the streets, not in the suites" (to borrow a phrase from Ralph Nader), not realizing at all that they had narrowed the definition of crime in this analysis. 39|40 Moreover, the most ubiquitous crimes in this country are victimless — drug offenses, prostitution, public drunkenness, vagrancy — but they receive barely a mention in the typical law school class. And, focusing on the strawman himself, the professor had missed an excellent opportunity to highlight an area in need of legal research and change. Rather than scaring neophytes about the negative uses to which such data can be put, why not use this information positively and begin to examine the causes of crime and how (if at all) criminal law can be used (or modified) to change such patterns? Such is the power of the strawman that none of these issues surfaced during the discussion.

Indeed most of the class did come away from the discussion fearful of the use to which social-science data could be put and committed — in theory — to a constitutional defense of each and every criminal defendant, free of statistical or causal "determinist" analysis. Never mind all the social-science evidence showing that the criminal defense attorneys who would raise these constitutional protections on behalf of their poor and minority clients are so overworked and compromised by the adversary system that in almost 90% of the cases they bargain for guilty pleas without ever so much as raising a single constitutional objection. Never mind the social-science evidence that these people are more likely to be suspected, arrested, prosecuted, and incarcerated because of their race and social class.

Be grateful instead for a system of "due process" that *could* guarantee that constitutional rights are upheld in the course of this endemic and well-documented more *basic* mistreatment. Indeed, it is this system, and this system of education, that makes lawyers the exclusive guardians of our rights and empowers them to make policy decisions in our society only *after* it has convinced them that limited legal rights are all that matter, and creates a dependency on narrow, often illusory, legal formulas in our society as well as in its lawyers.

The Adversary System: Don't Be a Boor, Who Really Knows the Truth?

> It's very hard when you get to law school to maintain the ideal you have because you learn so quickly that nothing you believed in is absolute. There are really two sides or fifty sides to every question.
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> Student comment
> Stanford Law School
> Board of Visitors Report,
> 1975-1976

The adversary system rests upon a procedural notion of truth. Literal truth is the secondary (and by no means necessary) outcome of a fair, balanced adversarial process. Of course, the

system cannot function without the existence of two sides to an issue — two sides close enough together but far enough apart so that a "real" conflict exists, yet sufficiently "balanced" so that "experts" (lawyers and judges) are needed to solve the dilemma. Law students in this system are taught to accept unquestioningly certain fundamental assumptions (perhaps the most important of which are the rules of the adversary game itself), but to become intensely disputatious about literally *everything* else.

For the adversary system to operate, then, there must be conflict or the *appearance* of conflict. In order to operate within the adversary system, the neophyte law student adds at least three new expressions to his or her vocabulary: "There is a colorable legal argument...," "It's a close question...," and "But on the other hand...." At the same time, the student is warned against the use of certain words in legal writing: "'We', 'I', 'believe', and 'think' should be avoided altogether in legal discourse," as one of our second-term legal writing instructors told his class. This terminology and these habits of speaking and writing are the surface manifestations of a much deeper set of changes in thinking and feeling that legal education effects.

Law students are constantly *assigned* points of view to advocate or defend. In classroom discussion, in moot court exercises, and in all-important final examinations students are given one side of an issue and evaluated on the basis of how well they present their assumed positions. The consummate legal skill, they are taught, is to be able to argue *both* sides of an issue *equally* well. And even within a single position or point of view, flexibility is the touchstone. An advocate must be able to instantly change direction or alter the basis of an argument as the court indicates displeasure with the preferred rea- 40|41 soning or justification. The psychological consequences of this indiscriminate role-playing and constant shifting of opinion and position are nowhere discussed.

Students are chided to "unpack" the overstuffed conceptual baggage of "justice" and "fairness". Apparently, terms like "economic efficiency" become neatly packed in luggage whose design is so compact that it cannot be improved upon. Whatever cannot be quantified (or perceived by the largely upper- or middle-class students in a tangible way) cannot become part of the cost-benefit analysis urged upon them. Intangibles like "justice" and "truth" are quickly dismissed as sophomoric concerns, too imponderable to become part of any "bottom-line" calculation. Risk, in these terms, is always calculated as loss from the status quo, rather than foregoing opportunities to achieve the possible or what might have been. Coupled with the hierarchical and historical nature of legal decision-making, this obsession with risk instills a strongly conservative bias in many students. Creativity is discounted and caution rules.

Despite disclaimers to the contrary, of course, values *are* taught in law school classrooms. Indeed, as we have tried to show, a powerful set of biases is introduced into legal thinking, albeit implicitly and with little or no awareness or discussion. It is a pedagogy that teaches as much by what it does not say as by what it does. It is the kind of pedagogy, for example, that allows professors in administrative law to make fun of environmentalists who challenged the standing requirements in federal courts so that could sue on behalf of fish and trees, but to mock them in seemingly "neutral" fashion. The professor sarcastically and righteously bellowed, amidst much student laughter, "who really represents the fish?" His implied condemnation centered on the "hold-up" value of such cases — his suggestion that environmentalists could use their standing to "extort" millions of dollars from large corporation. Did the professor really not know that the courts regularly appoint guardians to represent minors and the mentally disabled? Did he not know that a corporation is a legal fiction — clearly less alive than fish or trees? Who represents the *corporations*? Of course, we did not need to ask.

And even when the law seems to openly embrace certain noble values, the structure of legal education can act to subvert them. In a book entitled *Persons and Masks of the Law* (1976), for example, John Noonan has written very persuasively about the law's lack of real concern with *persons*, despite its expressed devotion to upholding the rights of individuals. Instead, his analysis shows that persons function in law as "masks", acting as a cover for the real determinants of decisions rather than a personalizing reality in legal opinions. This professional myopia originates in law school, where no time is spent discussing *who* the parties are in the cases that are examined or what the real consequences of judicial decisions are for the parties who brought the lawsuit. Instead, people and their problems are used as nothing more than vehicles for the illustration of abstract legal principles.

Legal fictions can render reality impotent and unimportant. When facts are surrendered up to legal definitions that bear little relationship to the events they supposedly describe, a kind of epistemological anarchy reigns. In this arena victory goes to whomever persuades best. Of course, the ability and resources to marshall persuasive arguments are not evenly distributed in our society. Once again, the powerful and wealthy, and the status quo, are the beneficiaries of the law's neutral principles. In the "value-free" world of legal neutrality, law students are not encouraged to take the inherent biases of law and legal education into account. If they were, perhaps they would soon realize that the methodology of law is not so much a powerful method as it often merely the method of the powerful.

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From *The People's Law Review* by Ralph Warren, ed. (Nolo Press, 1980), pp. 36-41